INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	3
Statement	3
Argument	7
Conclusion	13
Appendix	14

CITATIONS

Cases:	
Cohn v. *United States*, 20 F. (2d) 56	10
Crane v. *United States*, 73 C. Cls. 677	10
Dillon v. *Lincker*, 266 Fed. 688	8
Emergency Fleet Corporation v. *Western Union*, 275 U. S. 415	10
In re All Star Feature Corp., 232 Fed. 1004	8
King County, Washington v. *United States Shipping Board*, 282 Fed. 950	10
Miller v. *Robertson*, 266 U. S. 243	11, 12
North Dakota-Montana W. G. Ass'n v. *United States*, 66 F. (2d) 573, certiorari denied, 291 U. S. 672	10
Pine River Logging Co. v. *United States*, 186 U. S. 279	8
Standard Steel Car Co. v. *United States*, 67 C. Cls. 445	12
The Floyd Acceptances, 7 Wall. 666	8
Truscon Steel Co. v. *United States*, 70 C. Cls. 727	12
Union Bank v. *Geary*, 5 Pet. 99	8
United States v. *Czarnikow-Rionda Co.*, 40 F. (2d) 214	10
United States v. *Goltra*, Nos. 191, 192, October Term, 1940, decided February 3, 1941	9
United States v. *Nashville, &c. Ry. Co.*, 118 U. S. 120	10
United States v. *Skinner & Eddy Corp.*, 35 F. (2d) 889	10, 12
United States v. *Summerlin*, 310 U. S. 414	8
United States v. *Wood*, 290 Fed. 109, aff'd, 263 U. S. 680	10
Whan v. *Green Star S. S. Corp.*, 22 F. (2d) 483	11
Whiteside v. *United States*, 93 U. S. 247	8
Wilber National Bank v. *United States*, 294 U. S. 120	8
Statutes:	
Merchant Marine Act of June 5, 1920, c. 250, Sec. 1, 41 Stat. 988, 46 U. S. C. Sec. 861	10, 14
Shipping Act of Sept. 7, 1916, c. 451, Sec. 11, 39 Stat. 728, 731, 46 U. S. C. Sec. 810	6
Miscellaneous:	
Executive Order No. 2664, July 11, 1917	6, 9, 15
Executive Order No. 3018, December 3, 1918	6, 9, 17
Williston on *Contracts*, Sec. 136, p. 479	8

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 681

THE SHIP CONSTRUCTION & TRADING CO., INC.,
PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 69–80) is reported in 91 C. Cls. 419.

JURISDICTION

The judgment of the Court of Claims was entered on April 1, 1940 (R. 80). A motion for a new trial was overruled on October 7, 1940 (R. 80–81). The petition for a writ of certiorari was filed on January 6, 1941 (R. 263). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTIONS PRESENTED

The United States Shipping Board advertised certain ships for sale. Petitioner was the highest bidder. The court below found that the Board never accepted petitioner's bid, and a counterproposal submitted by the Board for acceptance within a stated time was withdrawn before acceptance by petitioner. On petitioner's suit for breach of contract, the United States counterclaimed for certain overpayments made to petitioner by the Emergency Fleet Corporation. The questions presented are:

1. Whether the finding of the court below that the Board did not accept petitioner's bid is supported by substantial evidence.

2. Whether petitioner's unrequested forbearance from suit rendered ineffective the Board's revocation of its counter proposal within the period set for acceptance.

3. Whether the finding of the court below that the fair market value of the ships did not exceed petitioner's bid is supported by substantial evidence.

4. Whether the United States owns the counterclaim, either as principal on the contracts or as successor to the rights of the Emergency Fleet Corporation.

5. Whether the United States is entitled to interest on the counterclaim from the date of its

rendition of an account to petitioner and demand for the balance claimed to be due.

STATUTES INVOLVED

The applicable provisions of the statutes involved are set forth in the Appendix, *infra*, pp. 14–18.

STATEMENT

Petitioner brought this suit to recover $3,198,298[1] for breach of a contract claimed to have been entered into between petitioner and the United States Shipping Board (R. 2–16, 35). The United States counterclaimed for an overpayment made to petitioner by the Emergency Fleet Corporation in connection with another transaction (R. 17–19, 35).[2]

The facts, as found by the Court of Claims (R. 35–68), may be summarized as follows:

In the summer of 1921 the United States Shipping Board publicly advertised for sale 285 wooden ships (R. 36–38). Petitioner submitted the highest bid, $2,100 per ship (R. 39–40). Certain of the conditions attached to the bid were unacceptable to the Board, and an amended bid was submitted on August 5, 1921 (R. 40–44).

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[1] Petitioner originally claimed $4,691,000 (R. 15) but subsequently reduced its claim to $3,198,298, the amount claimed in the petition for certiorari (Pet. 1).

[2] On November 3, 1930, the Court of Claims overruled petitioner's demurrer to the Government's counterclaim, and on January 12, 1931, overruled petitioner's motion for reconsideration (R. 1). Certiorari was denied by this Court. 285 U. S. 835 (R. 2).

At a meeting of the Board on August 9, 1921, Commissioner Plummer proposed a resolution accepting petitioner's bid, except as to vessels covered by higher bids (R. 45–46). The minutes of the meeting showed that the resolution was adopted (R. 45–48). However, Commissioner Lissner, who had been designated by the Board to verify and approve its minutes, refused to approve that part of the minutes relating to the acceptance of petitioner's bid, and that part was never adopted, ratified, or approved by the Board (R. 48). The court below found that at the August 9th meeting no definite action was taken on petitioner's bid, decision being delayed until the Board was satisfied, among other things, as to petitioner's financial standing, and for submission of the proposal to the President (R. 48–49).

However, Commissioner Plummer, who had been absent during part of the discussion and who was not correctly informed as to the action which the Board had taken, notified petitioner that the Board had accepted petitioner's bid (R. 50–51).[3] This notification was not authorized by the Board, and on learning of it the Board notified petitioner

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[3] Commissioner Plummer had the Board's Secretary send petitioner a copy of the proposed resolution accepting petitioner's bid (R. 50–51). To this copy the Secretary signed the names of Commissioner Plummer and Edward P. Farley (R. 51), who was in charge of selling the ships (R. 153). Mr. Farley did not know of the existence of the document until later (R. 51).

that it had not accepted its bid (R. 51–52). After further negotiations the Board, on August 19, adopted a resolution authorizing the presentation of a contract to petitioner, and giving petitioner until August 23 to accept (R. 51–54). Petitioner having objected to various terms, negotations were continued and the resolution of August 19 was successively extended, petitioner being given until September 29th to accept (R. 54, 55). On September 27, however, the Board, having been advised by counsel that an appraisal of the value of the ships as required by statute had not been made, adopted a resolution revoking its offer to petitioner (R. 55). On receiving a copy of this resolution, petitioner, on September 28th, signed the contract and demanded performance (R. 55–58). The Board declined to be bound and did not further attempt to enter into a contract with petitioner (R. 58).

On August 22, 1922, the Board had the ships appraised: the appraisement was at $2,500 per ship (R. 58). Between September 1922 and August 1923, 235 of the ships were sold at an average price of $3,318.58 (R. 58). The ships were then scrapped by the purchaser, who sustained an average loss of $1,196.16 per ship. Between December 1921 and June 1922, 18 of the 268 ships were scrapped by the Board, yielding an average net receipt of $2,061.45 per vessel (R. 58–59).

The court below denied recovery on petitioner's claim on the ground that no contract had been entered into for the sale of the wooden ships to petitioner, and on the further ground that there was no market for such ships and that the fair value did not exceed petitioner's bid.

The United States' counterclaim arose out of a contract and supplemental contract entered into between the United States Shipping Board Emergency Fleet Corporation and petitioner, pursuant to the Shipping Act of September 7, 1916, c. 451, Sec. 11, 39 Stat. 728, 731, 46 U. S. C. sec. 810, and Executive Orders of July 11, 1917, and December 3, 1918 (R. 59–62). See Appendix, *infra*, pp. 15–18. Under the original contract, entered into on June 15, 1917, petitioner was to construct two wooden hulls (R. 62–63). On October 29, 1917, the Fleet Corporation, as permitted by the terms of the contract, terminated petitioner's right to proceed further, on account of its failure to make satisfactory progress (R. 63). On November 22, 1917, the Fleet Corporation entered into a supplemental contract with petitioner whereby petitioner was to complete the hulls partially constructed under the original contract (R. 63–66). On the completion of the hulls the Fleet Corporation overpaid petitioner in the amount of $299,918.27 (R. 66). The cause of action for the overpayment accrued on July 28, 1919 (R. 66). On February 28, 1922, the Fleet Corporation rendered an account showing a

balance due it from petitioner of $488,310.24, and made demand for that amount (R. 68).[4]

The court below held that the United States was entitled to recover on its counterclaim for $299,918.27, with interest from February 28, 1922, the date of the rendition of account and of demand of payment by the Fleet Corporation.

ARGUMENT

1. The court below found that the United States Shipping Board did not accept petitioner's bid at the meeting of August 9, 1921 (Fdg. 4, R. 45–49). The evidence admits of no other conclusion. The testimony of the Commissioners (R. 103–105, 109, 112, 113, 115, 117, 124), discussed in the opinion below (R. 72–77), clearly shows that the Board did not take final action with respect to petitioner's bid, and that the resolution authorizing acceptance was acted upon informally only, and subject to Presidential and Congressional approval (R. 73, 74, 105, 106, 111, 113, 115–117) and to a satisfactory showing of financial responsibility on petitioner's part (R. 118, 119).

In notifying petitioner that the Board had accepted its bid, and transmitting a copy of the proposed resolution, Commissioner Plummer acted under misapprehension and without authority (R. 76–77). His action, therefore, was not bind-

[4] Subsequently, on June 12, 1936, the claim was reduced to $299,918.27 by stipulation (R. 262–263).

ing on the Board. The United States is not bound by the unauthorized acts of its agents, even in so-called "commercial" transactions. *The Floyd Acceptances,* 7 Wall. 666; *Whiteside* v. *United States,* 93 U. S. 247; *Pine River Logging Co.* v. *United States,* 186 U. S. 279. Compare *United States* v. *Summerlin,* 310 U. S. 414. And were the rule otherwise, petitioner has not shown that he acted in reliance, and to his detriment, on Commissioner Plummer's communications. Compare *Wilber National Bank* v. *United States,* 294 U. S. 120, 124.

Petitioner's acceptance, on September 28, 1921, of the contract submitted by the Board was ineffectual, since the acceptance was made with knowledge that the offer had been withdrawn on the previous day. The contention that the Board was bound to keep the offer open until September 29 because of petitioner's forbearance from suing for breach of contract is without substance. It is not suggested that the parties executed a bilateral agreement whereby petitioner undertook to forbear, and, as the cases cited by petitioner specifically state, actual forbearance in the absence of a request to do so does not constitute consideration for a unilateral contract. *Union Bank* v. *Geary,* 5 Pet. 99; *In re All Star Feature Corp.,* 232 Fed. 1004 (S. D. N. Y.); *Dillon* v. *Lineker,* 266 Fed. 688 (C. C. A. 9th); Williston on *Contracts,* Sec. 136, p. 479. The record is barren of

any evidence that the Board requested petitioner to forbear from suit. The Board merely continued to negotiate with petitioner in an attempt to arrive at a contract satisfactory to both parties (R. 51–55).

2. Even assuming a contract was entered into, petitioner failed to prove any damages by reason of its breach. The court below found that there was no market for the wooden ships, due to the complete collapse of the shipping industry in 1920, and that the fair market value of the ships, best evidenced by the subsequent transactions concerning them, did not exceed the amount of petitioner's bid (R. 58–59, 77–78). The Court of Claims rejected petitioner's proof as to fair value as "conjectural and based on estimates not supported by any substantial or convincing facts" (R. 59, 78). "It was for the Court of Claims to decide what weight such facts deserved * * *" *United States* v. *Goltra,* Nos. 191, 192, October Term, 1940, decided February 3, 1941.

3. Petitioner's contention that the United States does not own the counterclaim is plainly without merit. The Fleet Corporation acted as the agent of the United States, exercising powers delegated to it by the President under executive orders of July 11, 1917, and December 3, 1918, set out, *infra,* pp. 15–18. All the transactions of the Fleet Corporation, including those from which the counterclaim stemmed, were financed by pub-

lic funds appropriated by Congress. Clearly, therefore, the United States could sue to recover overpayments made by the Fleet Corporation. *United States* v. *Skinner & Eddy Corporation*, 35 F. (2d) 889 (C. C. A. 9th); *Crane* v. *United States*, 73 C. Cls. 677; cf. *King County, Washington* v. *United States Shipping Board*, 282 Fed. 950 (C. C. A. 9th). But in any event, this claim was unquestionably transferred to the Shipping Board by Section 4 of the Merchant Marine Act of 1920, set out *infra*, p. 14, and could thereafter be asserted by the United States as its own.[4] *Emergency Fleet Corporation* v. *Western Union*, 275 U. S. 415, 424; *United States* v. *Czarnikow-Rionda Co.*, 40 F. (2d) 214 (C. C. A. 2d); see *King County, Washington* v. *United States Shipping Board, supra*, at 951.

Of the cases cited by petitioner (Pet. 8) only *United States* v. *Wood*, 290 Fed. 109 (C. C. A. 2d), affirmed without opinion, 263 U. S. 680, in-

[4] The counterclaim is not barred by the statute of limitations. Even assuming that the statute could be pleaded in bar if the claim had remained in the hands of the Fleet Corporation, the transfer of the claim to the Shipping Board destroyed any such defense. The Shipping Board is clothed with all the sovereign immunities (*Cohn* v. *United States*, 20 F. (2d) 56 (C. C. A. 6th); see *North Dakota-Montana W. G. Ass'n* v. *United States*, 66 F. (2d) 573, 577 (C. C. A. 8th), certiorari denied, 291 U. S. 672), and since it acquired the claim before the limitation period had run, the statute of limitations cannot be pleaded as a bar. *United States* v. *Nashville, &c. Ry. Co.*, 118 U. S. 120, *United States* v. *Czarnikow-Rionda Co.*, *infra*.

volved the right of the United States to assert a claim founded on a contract executed by the Fleet Corporation. And that case merely held that the United States could not establish a preference by an independent action in equity after the Fleet Corporation had first filed the claim in bankruptcy in its own name, and its claim for preference had been rejected. See *Whan* v. *Green Star S. S. Corp.*, 22 F. (2d) 483, 487–488 (C. C. A. 2d).

4. Petitioner also challenges the lower court's award of interest on the counterclaim from March 18, 1922, the date on which the Fleet Corporation rendered an account to petitioner and made demand for payment of the balance due. Petitioner contends that interest could not properly be allowed because the counterclaim was unliquidated; and that the stipulation entered into in 1936 fixing the amount of the overpayment at $299,918.27, a figure lower than that asserted by the Fleet Corporation in 1922, not only shows that the claim was theretofore unliquidated but was intended to fix the total amount of the judgment.

In the first place, a trial court has considerable discretion in the allowance of interest even on unliquidated demands: "One who has had the use of money owing to another justly may be required to pay interest from the time the payment should have been made." *Miller* v. *Robertson*, 266 U. S. 243, 257–258. No showing is made that the court below abused its discretion in allowing interest.

Petitioner agreed to repay the amount advanced by the Fleet Corporation for completion of the vessels in excess of the original contract price (R. 65–66). The amount of the overpayment was thus known to petitioner or readily ascertainable. Cf. *Miller* v. *Robertson, supra,* at 258.

In the second place, the rendition of an account and demand for payment may start the running of interest even in cases where it would not otherwise be allowed. *United States* v. *Skinner & Eddy Corporation,* 35 F. (2d) 889, 901–902 (C. C. A. 9th). This principle is recognized in the cases relied on by petitioner (Pet. 9). See *Standard Steel Car Co.* v. *United States,* 67 C. Cls. 445, 490–491; *Truscon Steel Co.* v. *United States,* 70 C. Cls. 727, 729–730. It is immaterial to the operation of this principle that the demand in 1922 was for a greater amount than that fixed in the stipulation entered into in 1936. *United States* v. *Skinner & Eddy Corporation, supra,* at 902.

The suggestion that the statement in the stipulation, that "there is now justly due and owing the defendant from the plaintiff the sum of $299,918.27" (R. 263), was intended to fix the total amount of the judgment seems plainly unfounded. Elsewhere the stipulation recites that the Fleet Corporation overpaid petitioner by that amount (R. 263), and there is nothing in the stipulation indicative of an intention to waive interest.

CONCLUSION

The petition raises no question of public importance, and there is no conflict of decisions. The findings of the court below are supported by substantial evidence. It is therefore respectfully submitted that the petition should be denied.

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